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NO. 80-455

In the Supreme Court of the United States

OCTOBER TERM, *1980*

MRS. MARIA TOTH FUTO, in her capacity as the personal representative and administratrix of the estate of JOHN FUTO,

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Intervenor

VERSUS

LYKES BROTHERS STEAMSHIP COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

A) QUESTIONS PRESENTED

1) Does the application of the negligence standard found in Sections 342, 343, and 343(A) of the Restatement (Second) of Torts (1965) to the adjudication of a motion for summary judgment of dismissal in a wrongful death action brought pursuant to 33 U.S.C. § 905(b), contravene the Congressional intent expressed in the passage of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act in that these Restatement (Second) of Torts sections import the doctrines of contributory negligence and assumption of the risk?

2) Even if the Restatement of Torts standard is applied, should not a shipowner be liable for the wrongful death of a harbor worker killed aboard the vessel as a result of a fall from a hazardous scaffold where the shipowner, through its employees, had actual and constructive knowledge of the dangers posed by the scaffold yet failed to warn the harbor worker or to take steps to alleviate the hazard?

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OPINIONS RENDERED

No written opinion has been rendered in this matter in the United States District Court for the Eastern District of Louisiana or in the United States Court of Appeals for the Fifth Circuit. Accordingly, there are no official or unofficial reports of opinions delivered in the courts below.

B) GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(i) The judgment sought to be reviewed was rendered by the United States Court of Appeals for the Fifth Circuit on May 27, 1980, affirming the judgment of the United States District Court for the Eastern District of Louisiana which was rendered on September 12, 1979.

(ii) Application for a panel rehearing was filed with the

United States Court of Appeals for the Fifth Circuit on June 9, 1980. The application for rehearing was denied on June 23, 1980.

(iii) The intant litigation arises under 33 U.S.C. § 905(b), Longshoreman's and Harbor Workers' Compensation Act. Accordingly, the instant action presents a federal question and this Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

This case involves the interpretation of 33 U.S.C. § 905 (b), added to the Longshoremen's and Harbor Workers' Compensation Act by the 1972 Amendments:

> "In the event of injury to a person covered under this chapter caused by the negligance of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services no such action shall be permitted if the injury was caused by negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of

> seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

STATEMENT OF THE CASE

On October 7, 1977, John Futo was working as a machinist for Dixie Machine Welding and Metal Works aboard the S.S. Shirley Lykes, which was docked in navigable waters in the Mississippi River near the Andry Street Wharf in the City of New Orleans,Louisiana. The S.S. Shirley Lykes was undergoing minor, general repairs in connection with a survey required by the American Bureau of Shipping of all American flag vessels every five years. (Record on appeal, Vol. I at 232-233.) During the repair work the vessel remained equipped with its engines and propellers, maintained a crew, and was in navigation. (Record on appeal, Vol, I at 239-242.) At all times during the survey repair work, the vessel and repair work were under the control of Lykes Brothers Steamship Company, Inc. through its captain, crew and the Lykes Brothers port engineer and port captain assigned to the vessel. (Record on appeal, Vol. I at 206-7, 209, 236-7, 242.) The job specifications which Dixie Machine Welding and Metal Works was contractually obligated to perform aboard the S.S. Shirley Lykes contain repeated references to anticipated supervisory involvement by representatives of Lykes Brothers Steamship Company, Inc. (See Record on appeal, Vol. I at 45-78 .) The captain, a sea-

man of 27 years and crew members (one of whom had 32 years of experience, 19 of these aboard the S.S. Shirley Lykes) of the S.S. Shirley Lykes made regular inspections of the vessel and work areas throughout the survey repair work, and more specifically during the period in which the hazard, which caused John Futo's death, was present in one of the work areas aboard the vessel. (Record on Appeal, Vol.I at 206, 207, 209, 236, 237, 242.)

While the S.S. Shirley Lykes was under the control of Lykes Brothers on October 7, 1977, John Futo fell to his death from a defective scaffold while dismantling one of the vessel's derricks. (Record on Appeal, Vol. I at 203-4). The scaffold from which he was caused to fall lacked proper guardrails, which condition Lykes Brothers crew members recognized as hazardous.(Record on Appeal, Vol. I at 203, 204, 253; Vol. II at 3). Even though Lykes Brothers crew members recognized the hazardous condition posed by the lack of guardrails on the scaffold, the District Court found that they failed to warn the decedent of the danger and failed to take any affirmative steps to alleviate the hazardous condition. (Record on Appeal, Vol. II at 3).

On October 28, 1977, John Futo's widow, the plaintiff, Maria Toth Futo, on behalf of herself, her one year old child and her unborn infant, brought suit in the United States District Court for the Eastern District of Louisiana against Lykes Brothers Steamship Company, Inc., the owner of the S.S. Shirley Lykes, for its negligent failure to warn of and correct the

hazardous condition aboard the vessel which led to John Futo's death. (Record on Appeal, Vol. I at 1). The basis for federal jurisdiction in the District Court was established by the fact that the action was brought pursuant to a federal statute, 33 U.S.C. § 905(b), and the District Court's "federal question" jurisdiction was therefore invoked within the meaning of 28 U.S.C. § 1331. The action sought recovery for the decedent's pain and suffering before his death, for decedent's wrongful death and for plaintiff and her minor childrens' loss of support, maintenance, education, guidance, society, nurture and for funeral expenses incurred.

On August 16, 1979, the defendant, Lykes Brothers Steamship Company, Inc. filed a motion for summary judgment. (Record on Appeal, Vol, I at 173). On September 12, 1979, the motion for summary judgment came on for hearing and was granted by the District Court, dismissing plaintiff's case at her cost and depriving her and her children of their right to have their case tried to a jury on its merits. (Record on Appeal, Vol. I at 332). Plaintiff filed notice of appeal to the United States Court of Appeals for the Fifth Circuit on September 21, 1979. (Record on Appeal, Vol. I at 329). On May 27, 1980, the Fifth Circuit Court of Appeals, panel of Judges Gee, Henderson and Hatchett presiding, summarily and without oral argument affirmed the judgment of District Court without written opinion. On June 9, 1980, plaintiff filed with the Fifth Circuit Court of Appeals a petition for panel rehearing and on June 23, 1980, the Court of Appeals denied the petition for rehearing.

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AFFIRMED A GRANT OF SUMMARY JUDGMENT BASED UPON A NEGLIGENCE STANDARD WHICH, WHEN APPLIED TO NEGLIGENCE ACTIONS BROUGHT PURSUANT TO 33 U.S.C. § 905(b), CONTRAVENES THE EXPRESS INTENTION OF CONGRESS THAT THE DOCTRINES OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF THE RISK WOULD NOT BE IMPORTED INTO THE ADJUDICATION OF SHIPOWNER LIABILITY UNDER THAT STATUTE. *THERE EXISTS AN IRRECONCILABLE SPLIT OF OPINION AMONG THE CIRCUITS REGARDING THE APPROPRIATE NEGLIGENCE STANDARD TO BE APPLIED TO ACTIONS BROUGHT PURSUANT TO 33 U.S.C. § 905(b). ACCORDINGLY, IT IS SUBMITTED THAT THIS HONORABLE COURT SHOULD GRANT THE INSTANT PETITION FOR WRIT OF CERTIORARI FOR THE PURPOSE OF DEFINING THE APPROPRIATE 905(b) NEGLIGENCE STANDARD.*

Since its seminal decision in *Gay v. Ocean Transport & Trading, Ltd.*, 546 F. 2d. 1233 (5th Cir. 1977), the Fifth Circuit Court of Appeals has applied Sections 342, 343 and 343 (A) as the shipowner's negligence standard in actions brought pursuant to 33 U.S.C § 905(b) *Gay, supra* at 1238; *Brown v. Mitsubishi Shintaku Ginko*, 550 F. 2d 331, 333 (5th Cir. 1977); *Wiles v. Delta Steamship Lines, Inc.*, 574 F. 2d 1338 (5th Cir. 1978); *Samuels v. Empresas Lineas Maritimas Argen-*

tinas, 573 F. 2d 884, 886 (5th Cir. 1978), cert. den. 443 U.S. 915, 99 S. Ct. 3106, 61 L. Ed. 2d 878 (1979). Similarly, the Second Circuit has adopted these Restatement sections as its § 905(b) negligence standard, *Napoli v. Hellenic Lines*, 536 F. 2d 505 (2nd Cir. 1976); *Lubrano v. Royal Netherlands S.S. Co.*, 572 F. 2d 364 (2nd Cir. 1978); *Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F. 2d 789, 795 (2nd Cir. 1979) as well as the Fourth Circuit, *Anuszewski v. Dynamic Mariners Corp., Panama*, 540 F. 2d 757 (4th Cir. 1976), cert. den. 429 U.S. 1098, *Chavis v. Finnlines Ltd. O/Y*, 576 F. 2d 1072 (4th Cir. 1978). Moreover, the Seventh Circuit has indicated a willingness to adopt the abovementioned Restatement sections. *Clemons v. Mitsui O.S.K. Lines, Ltd.*, 596 F. 2d 746 (7th Cir. 1979).

Sections 342, 343 and 343(A) of the Restatement (Second) of Torts (1965) read as follws:

Section 342 states:

> "A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
>
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved."

Section 343 states:

"A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against danger."

Section 343 (A) continues, *

"(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of

* Restatement (Second) of Torts § 343, Comment a (1965) instructs that section 343 should be read together with § 343(A).

> the facilities of a public utility, is a factor of a public utility, is a factor of importance indicating that the harm should be anticipated."

In granting the defendant Lykes Brothers' Motion for Summary Judgment, the District Court indicated in its oral assignment of reasons for judgment that it had relied upon the § 905(b) negligence standard as first enunciated in *Gay v. Ocean Transport & Trading, Ltd., supra* and as paraphrased in *Brown v. Mitsubishi Shintaku Ginko, supra.* (Record on Appeal, Vol. II at 3,4,5,6). The District Court defined the appropriate negligence standard accordingly:

> "A three part analysis is necessary to determine the shipowner's liability.
>
> First, did the crew know of the hazard, and if so did the crew warn the invitees?" (Record on Appeal, Vol. II at 3)
>
> * * *
>
> "Second, according to *Brown*, even if the crew was aware of the danger, it could be relieved of its duty to warn if the deceased knew or should have known of the danger." (Record on Appeal, Vol. II at 3).
>
> * * *
>
> "The third part of the analysis laid out in *Brown* requires an answer to the following question:
>
> 'Even though the Plaintiff was aware of the hazard, should the Defendant have anticipated that the deceased, notwithstanding his knowledge of the danger, would

continue to expose himself to the hazard?'

If the answer is yes, the shipowner would still have a duty to correct the hazard.

If the answer is no, the shipowner would be relieved of this duty, even though the crew knew of the danger." (Record on Appeal, Vol. II at 5)

It is submitted that the negligence standard adopted by the Fifth Circuit and applied by the District Court in the instant case contravenes the express intention of Congress that the doctrines of contributory negligence and assumption of the risk would not be imported into the adjudication of shipowner liability in actions brought pursuant to 33 U.S.C. § 905(b). This contention is supported by the legislative history of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, which states, in pertinent part:

"The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employees's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of 'assumption of risk' in an action by an injured employee shall also be applicable." (H. Rep. No. 92-1441, 92nd Cong., 1st Sess., reprinted in 1972 U.S. Code Cong. and Admin. News at 4704-4705.)

Unfortunately, the Second, Fourth and Fifth Circuits, as well as the District Court in the instant case have failed to follow this clear expression of legislative intent and have adopted a § 905(b) negligence standard which clearly embraces the prohibited doctrines of contributory negligence and assumption of risk. (See Restatement of Torts (Second) 1965 § 343, Comment b and § 343(A) Comment c). In so doing "the Restatement sections force courts to define a shipowner's standard of care under the amendments in terms of the plaintiff's perceptions of the danger posed by a given condition" and "(t)he sections thus tend to foreclose a balanced inquiry into the reasonableness of a vessel's conduct under the circumstances of a particular case and tend to limit the liability of shipowners for their proven negligence." *Gallardo v. Westfal-Larsen & Co. A/S,* 435 F. Supp. 484 (N.D. Cal. 1977). Accordingly, it is submitted that such a negligence standard is inconsistent with the view expressed by this Honorable Court in *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 99 S. Ct. 2753 (1979) that "we must reject a 'theory that nowhere appears in the Act, that never was mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts. . . a remedial Act. . ." 443 U.S. at 271.

Three Circuits agree with plaintiff's position and have rejected the abovementioned Restatement sections as carrying the prohibited contributory negligence/assumption of risk baggage. They include the First Circuit in *Johnson v. A/S Ivarans*

Rederi, 613 F. 2d 334 (1st Cir. 1980), U.S. Appeal pending, No. 79-1587, the Third Circuit in *Griffith v. Wheeling-Pittsburgh Steel Corporation*, 610 F. 2d 116 (3rd Cir. 1979), U.S. Appeal, pending No. 79-813, and *Rich v. United States*, 596 F. 2d 541, n. 21 (3rd Cir. 1979) and the Ninth Circuit in *Santos v. Scindia Steam Navigation Co.*, 598 F. 2d 480 (9th Cir. 1979), U.S. Appeal pending, No. 79-512. See also the dissent of Judge Godbold in *McCullough v. S/S Coppename*, 609 F. 2d 208 (5th Cir. 1979); Comment, 28 Hastings L.J. 771 (1977). These Circuits have all adopted instead a "reasonable care under the circumstances" standard inspired by this Court's decision in *Kermarec v. Compagnie Generale Transaltantique*, 358 U.S. 625, 79 S. Ct. 406 (1959), which is representatively stated in *Johnson v. A/S Ivarans Rederi, supra*, as follows:

> "The standard of reasonable care under the circumstances permits a finding of negligence upon a showing:
>
> (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury;
>
> (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and
>
> (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger," 613 F. 2d at 348; Accord: *Griffith v. Wheeling-Pittsburgh Steel*

Corporation, supra, 610 F. 2d at 125-126; *Santos v. Scindia Steam Navigation Co.,* 598 F. 2d at 485-486.

It is submitted that, in the instant case, in view of the fact that the District Court found that ". . . the crew did know of the danger, but failed to warn the deceased", (Record on Appeal, Vol. II at 3), had the District Court applied the proper negligence standard it would have denied the "Motion for Summary Judgment". Accordingly, because the application of the Restatement sections led to an erroneous judgment and affirmance in the instant case and because there is a split of authority among the Circuits regarding the proper negligence standard to be applied to § 905(b) actions, it is respectfully submitted that the instant "Petition for Writ of Certiorari" should be granted.

II. EVEN IF THE RESTATEMENT SECTIONS STATE THE PROPER NEGLIGENCE STANDARD TO BE APPLIED IN ACTIONS BROUGHT PURSUANT TO 33 U.S.C. § 905(b), IN THE INSTANT CASE THE DISTRICT COURT ERRED IN RELIEVING THE SHIPOWNER OF LIABILITY WHERE IT HAD ACTUAL AND CONSTRUCTIVE KNOWLEDGE OF THE DANGER AND FAILED TO WARN THE DECEDENT OF OR CORRECT THE HAZARD POSTED BY THE DEFECTIVE SCAFFOLD ABOARD SHIP. THE DISTRICT COURT ONLY FOUND THAT THE DECEDENT'S EMPLOYER HAD KNOW-

LEDGE OF THE DANGER; THE COURT DID NOT FIND ACTUAL KNOWLEDGE ON BEHALF OF THE DECEDENT AND THUS COULD ONLY HAVE BARRED PLAINTIFF'S ACTION BY IMPUTING THE NEGLIGENCE OF DECEDENT'S EMPLOYER TO THE DECEDENT IN ORDER TO ESTABLISH ASSUMPTION OF RISK. SUCH AN APPLICATION OF THE FIFTH CIRCUIT NEGLIGENCE STANDARD IS INCONSISTENT WITH THE VIEW OF 33 U.S.C. § 905(b) EXPRESSED BY THIS COURT IN *EDMONDS V. COMPAGNIE GENERALE TRANSATLANTIQUE.*

In its orally-assigned reasons for judgment, the District Court stated that the Lykes Brothers' crew ". . . did know of the danger, but failed to warn the deceased" (Record on Appeal, Vol. II at 3). Thus, the District Court agreed with plaintiff that parts "a) and c)" of Restatement § 343 fit the facts so as to indicate liability on the part of the defendant shipowner. The Court then answered the remainder of the analysis, found in § 343(b) and 343 (A) (1) (the assumption of risk portion) by stating that ". . . it appears to be uncontested then that *Dixie* was aware of the absence of handrails or scaffolding." (Record on Appeal, Vol. II at 5, emphasis supplied).

At no point did the Court determine or was there a showing that the decedent himself ever realized or was aware of the danger. The Court only found that the danger posed by the lack of guardrails was "known or obvious" to Dixie Machine, the de-

cedent's employer and then concluded that ". . .in the instant case. . . the lack of handrails 'was not the type of danger that must be faced notwithstanding knowledge." (Record on Appeal, Vol. II at 5).

It is apparent then that the District Court imputed Dixie Machine's awareness of the danger to the decedent. It is submitted that such a misapplication of the Restatement standard is inconsistent with this Court's view of 33 U.S.C. § 905(b) as expressed in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753 (1979). *In Griffith v. Wheeling-Pittsburgh Steel Corporation, supra,* the Third Circuit rejected a negligence standard which would have imputed an employer's negligence to an injured longshoreman stating:

> "Under American's first proposed standard of care the vessel would be relieved of liability to a longshoreman for unreasonably dangerous conditions on board ship whenever the stevedoring contractor failed to perform his tasks in an 'expert and experienced' fashion. This would occur whether or not the individual longshoreman was personally at fault. *The proposed rule thus imputes to the non-negligent longshoreman the negligence as a complete bar to recovery against the vessel. This result is at variance with the Supreme Court's interpretation of the 1972 Amendments in Edmonds v. Compagnie Generale Transatlantique, supra. It is inconceivable to us that the Court, which disapproved a rule that imputes the negligence of the stevedore to the longshoreman to reduce his recovery against a negligent shipowner, would approve a rule barring all recovery against a*

> *negligent shipowner on the basis of imputed employer negligence.*" (Emphasis supplied) 610 F. 2d at 124-125.

Thus, the Court in *Griffith* concluded that the decision of this Honorable Court in *Edmonds* by reasonable logical extension stands for the proposition that if the negligence of a stevedore cannot be imputed to the longshoreman for the purpose of *reducing* recovery against a shipowner, such stevedore negligence can certainly not be imputed to the longshoreman so as to bar all recovery. Yet the District Court imputed the negligence of the decedent's employer to him so as to bar all recovery by his surviving wife and the Fifth Circuit Court of Appeals affirmed, apparently ignoring this Honorable Court's statement in *Edmonds,supra,* that ". . .the ship will be liable for all of the damages found by the judge or jury; yet its negligence may have been only a minor cause of the injury." (Emphasis supplied) 443 U.S. at 269.

Accordingly, it is urged that, even if Restatement §§ 342, 343, and 343(A) state the proper § 905(b) negligence standard (which would be strictly contrary to the intent of Congress and the jurisprudence of this Honorable Court), the standard was misapplied in the instant case so as to impute the negligence of the decedent's employer to him so as to bar all recovery. Therefore, plaintiff respectfully submits that her "Petition for Writ of Certiorari" should be granted so that this Honorable Court may answer the novel questions presented above. Moreover, petitions for writs of certiorari have been filed and are pending in the following cases which present is-

sues similar to those presented here: *Santos v. Scindia Steam Navigation Company,* No. 79-512, filed September 26,1979 seeking cert. to Ninth Circuit; *Griffith v. Wheeling-Pittsburgh Steel Corporation,* No. 79-813, filed November 23, 1979 seeking cert. to Third Circuit; *Johnson v. A/S Ivarans Rederi,* No. 79-1587, filed April 10, 1980 seeking cert. to First Circuit; *Ernst Russ Steamship Co. v. Matthews,* No. 79-624, filed October 15, 1979 seeking cert to Seventh Circuit; *McCulley v. Mitsui O.S.K. Lines, Ltd.,* No. 79-706, filed November 1, 1979 seeking cert. to Seventh Circuit; *Stockstill v. Gypsum Transportation,* No. 79-1240, filed February 8, 1980 seeking cert. to the Fifth Circuit. It is submitted that, in view of the irreconcilable split that has arisen among the Circuits, this petition should be granted.

RESPECTFULLY SUBMITTED:

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APPENDIX

I. *REASONS FOR JUDGMENT ORALLY ASSIGNED BY THE DISTRICT COURT AT HEARING ON MOTION FOR SUMMARY JUDGMENT OF DISMISSAL, SEPTEMBER 12, 1979* (EXCERPTED FROM RECORD ON APPEAL, VOL. II AT PAGES 3-7)

"A three part analysis is necessary to determine the ship owner's liability.

First, did the crew know of the hazard, and, if so, did the crew warn the invitees? That's point Number 1.

Statements made by the crew members in their depositions (Powell on page 11; Ratley on page 2) indicate that the crew did know of the danger, but failed to warn the deceased.

Second, according to *Brown*, even if the crew was aware of the danger, it could be relieved of its duty to warn if the deceased knew or should have known of the danger.

Now, you argue that this is a contested issue that there's no evidence indicating that Dixie knew that it was violating a federal safety regulation and thereby creating an unsafe working condition. That's your contention.

But Oscar Crespo, a foreman of Dixie Machine, who was in charge of the work that was being performed by the deceased, made the following statements in his deposition:

Q. Who built the platform?

A. Dixie Machine built the platform.

Q. And when did they build it?

A. Usually the day - more likely the day before they went to work. Might have been there a day and a half, I don't know, but we built the platform. It

was a very stable platform, but handrails weren't put up yet.

Q. And when did you check it, the platform?

A. We checked it the same day when we put up the boards.

Q. Why didn't you see that handrails were put around it?

A. We didn't get to it, to tell you the truth. We didn't get to it. We were in the process of putting handrails up on the other side and they were working on this side.

Q. In other words, you anticipated getting to it at a later time?

A. Right, that day.

So it appears to be uncontested then that Dixie was aware of the absence of handrails or scaffolding.

The third part of the analysis laid out in Brown requires an answer to the following question:

Even though the Plaintiff was aware of the hazard, should the Defendant have anticipated that the deceased, not withstanding his knowledge of the danger, would continue to expose himself to the hazard?

If the answer is yes, the ship owner would still have a duty to correct the hazard.

If the answer is no, the ship owner would be relieved of this duty, even though the crew knew of the danger.

The *Brown* case suggests that in the instant case that the lack of handrails "was not the type of danger that must be faced notwithstanding knowledge". Look at page 334 of 550 Fed. Second.

Judge Wisdom made three important observations in

the *Brown* case.

(1) The Plaintiff was aware of the danger;

(2) The hazard was solely created by the Plaintiff's employer;

(3) The Plaintiff was in a better position to correct the hazard, even though the ship's crew also knew of the hazard.

I believe that the instant case is analogous to the *Brown* case.

(1) Dixie was aware of the hazard, for the point.

(2) Dixie was in the better position to create the hazard. Indeed, they planned to do so later in the day on the day of the accident.

Now, the *Brown* case drew its support from the earlier Fifth Circuit decision from *Gay versus Ocean Transportation & Trading, Inc.*, 546 Fed. Second, 1233; that's a 1977 case.

In the *Gay* case a stevedore was injured while unloading a ship.

The *Gay* Court ——

Let me withdraw that. The Court in the *Gay* case observed that (1) the Plaintiff knew of the hazard; (2) the hazard was solely created by the Plaintff, and; (3) the Plaintiff was in the best position to correct the hazard, and the Court in the *Gay* case concluded:

"It is clear that the vessel had no liability under Section 905(b) since the sole cause of the injury was the negligence of the Plaintiff." Look at page 1240 of 546 Fed.

Second.

I'm going to take one more shot at summary judgments, and I hope, Mr. Wright, you can uphold me.

I'm going to grant your motion for summary judgment."

II. FACSIMILE OF JUDGMENT OF DISMISSAL

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MRS. MARIA TOTH FUTO	*	CIVIL ACTION
VERSUS	*	NO. 77-3237
LYKES BROS. STEAMSHIP CO., INC.	*	SECTION "F"

* * * * * * * * * * * * * * * * *

JUDGMENT

THIS ACTION came on for hearing before the Court September 12, 1979, Honorable Lansing L. Mitchell, District Judge, presiding, on defendant's motion for summary judgment, and the motion having been duly considered, and a decision having been duly rendered;

IT IS ORDERED AND ADJUDGED that plaintiff, Mrs. Maria Toth Futo, individually and in her capacity as the personal representative and administratrix of the Estate of John Futo, take nothing, that the action be dismissed on the merits, and that the defendant, Lykes Bros. Steamship Co., Inc., recover costs of the action.

DATED at New Orleans, Louisiana, this 18th day of September, 1979.

/S/ LANSING L. MITCHELL

CLERK OF COURT

DATE OF ENTRY Sept. 28, 1979

III. FACSIMILE OF JUDGMENT OF THE COURT OF APPEALS AFFIRMING THE JUDGMENT OF THE DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-3359
Summary Calendar*

MRS. MARIA TOTH FUTO, in her capacity as the personal representative and administratrix of the estate of JOHN FUTO,

Plaintiff-Appellant,

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Intervenor-Appellant,

versus

LYKES BROS. STEAMSHIP CO., INC.,

Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana

(May 27, 1980)

Before GEE, HENDERSON and HATCHETT, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.1/

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*Fed. R. App. P. 34(a); 5th Cir. R.18.

1/ See *NLRB v. Amalgamted Clothing Workers of America*, 430 F.2d 966 (5th Cir. 1970.)

IV. FACSIMILE OF ORDER OF COURT OF APPEALS DENYING PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-3359

MRS. MARIA TOTH FUTO, in her capacity as the personal representative and administratrix of the estate of JOHN FUTO,

Plaintiff-Appellant,

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Intervenor-Appellant,

versus

LYKES BROS. STEAMSHIP CO., INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(June 23, 1980)

Before GEE, HENDERSON and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the

same is hereby denied.

ENTERED FOR THE COURT:

/S/ Albert J. Henderson

UNITED STATES CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I, Alonzo T. Stanga, III, a member of the Bar of the United States Supreme Court, do certify that service of three (3) copies of this petition for writ of certiorari was made by mail on Lykes Brothers Steamship Company, Inc. through its counsel of record, William E. Wright, at the offices of Terriberry, Carroll, Yancey and Farrell, 2100 International Trade Mart, New Orleans,Louisiana, and upon the Insurance Company of The State of Pennsylvania through its counsel of record, Peter L. Hilbert, Jr., at the offices of McGlinchey, Stafford and Mintz, Camp and Capdeville Streets, P.O. Box 2000, New Orleans,Louisiana, all in accordance with Rule 28, paragraph 3 and Rule 19, paragraph 3 of the Rules of the Supreme Court of the United States, this 19th day of September, 1980.

ALONZO T. STANGA, III
Attorney for Plaintiff